SUPREME COURT, U.S.
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MICHAEL RODAK, JR.

No. 75-867

In the Supreme Court of the United States

OCTOBER TERM, 1975

THOMAS E. KEANE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JEROME H. TORSHEN
11 South LaSalle Street
Chicago, Illinois 60603
312-372-9282

JOHN POWERS CROWLEY
53 West Jackson Blvd.
Chicago, Illinois 60604
Attorneys for Petitioner

SHERMAN C. MAGIDSON
MARIA A. SKIRNICK
EDWARD G. WIERZBICKI
On the Brief

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Thomas E. Keane, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 18, 1975.

OPINION BELOW

The opinion of the Court of Appeals, reported in 522 F.2d 534, appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of Illinois, Eastern Division.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 18, 1975. A timely petition for rehearing with suggestions for rehearing *en banc* was denied on October 20, 1975. On application duly made, the time for filing a petition for a writ of certiorari was extended to December 19, 1975. This petition has been timely filed. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a defendant's Fifth and Sixth Amendment rights of due process, confrontation and cross-examination are violated by the extensive use of a "business record" containing multiple hearsay conversations when the purported declarants are available but not called by the government, and where the content of the hearsay conversations furnish the only evidentiary support for a vital and pervasive element of the government's proof?

2. Whether the elevation in this case of vague state standards of ethical conduct to fluid standards of criminal conduct under the Mail Fraud Act deprived petitioner of due process of law?

3. Whether the prosecution in this case, especially in view of its reliance on state ethical standards, encourages intrusion into delicate areas of a state's administration of purely local procedures and shifts massively the authority given the federal government over local affairs?

4. Whether, in considering the various aspects of the alleged scheme, the court below, in sustaining the conviction, ignored the test that, even on appeal, there must be "substantial evidence" to sustain a conviction in a criminal case?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Amendment V.

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> "No person . . . shall be deprived of life, liberty, or property, without due process of law; . . ."

B. Amendment VI.

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . ."

C. United States Code, Title 28, §1732. Record made in regular course of business.

> "(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. . . ."

D. United States Code, Title 28: Federal Rule of Evidence, §803—Hearsay Exceptions—Availability of Declarant Immaterial.

> "(6) **Records of regularly conducted activity.** A memorandum . . . made at or near the time by, or from information transmitted by, a person with knowl-

edge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, . . . all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. . . ."

STATEMENT OF THE CASE

Petitioner, a lawyer since 1932, was, from 1945, an elected alderman of the City of Chicago and Chairman of its Council's Finance Committee.

In 1965, petitioner, with two others (Hennessey, Sr., a longtime specialist and investor in delinquent special assessment bonds, and Schwartz, a lawyer-real estate investor), formed a partnership ("Alpine") to purchase long tax delinquent, vacant real property at a county scavenger sale to be held pursuant to Illinois statute. The City of Chicago was in no way involved except to the extent that it, and other taxing bodies, might receive an aliquot share of the total amount of tax revenues collected by the County.

Certain realty was acquired by Alpine, through Hennessey, Sr. and its employees, at the scavenger sale. (The legitimacy of the scavenger sale, its procedures and the prices paid by Alpine have never been questioned.) Alpine's acquisitions were financed by legitimate bank loans. Deeds were ultimately obtained through statutory judicial proceedings for those properties which were not redeemed by the titleholders by statutory redemption. The properties were held either in the name of a nominee or placed in land trusts.[1] Special assessment liens (which were in no

[1] Purchase in the name of a nominee was common at the scavenger sale. (T. 703, 1074) A land trust is a recognized and common device for holding title in Illinois when multiple interests are involved and property is used for business purposes. (T. 2923)

way involved in the scavenger sale) were cleared.[2]

These properties were then offered for sale by Alpine. Some were sold to private parties in arm's length transactions. Others were acquired by certain governmental bodies by condemnation or other procedures in which the acquisition prices were based upon independent, federal or other governmental appraisals concerning which no questions have been raised.

In 1974, nine years after Alpine was formed, petitioner was indicted for conspiracy and mail fraud in connection with the above transactions. The first 20 counts of the indictment charged that petitioner, Hennessey, Sr. and Hennessey's son ("Junior"), an employee of Alpine, devised a scheme to defraud the City of Chicago, its citizens and aldermen, of their right to petitioner's loyal, faithful, disinterested and unbiased services and actions in the performance of his official duties, and of their right to have the City's business and affairs conducted honestly, impartially and free from corruption, fraud, undue influence and conflict of interest "in accordance with the laws of the State of Illinois and the City of Chicago . . ." (R. 3, p. 4) A twenty-first count charged conspiracy to commit this fraud. Hennessey and Junior were named as

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[2] Special assessments are not taxes. They are, by law, a means of financing local improvements which benefit property without resorting to the City's taxing power, funds or credit. Bonds are issued to the contractor making the improvement. The City acts as a fiscal agent, collecting the assessment from the private property owner and making payment to the bondholder, generally an assignee of the contractor or a subsequent purchaser. The bondholder has no recourse against the City, but may attempt to recover balances due by an action against the property.

unindicted co-schemers and co-conspirators; the third partner, Schwartz, was not charged at all.

Ultimately, petitioner's conviction on fourteen counts of mail fraud and one of conspiracy was affirmed.[3] Petitioner was sentenced to five years imprisonment and fined $27,000 and costs.

Although the prosecution was based upon state conflict-of-interest statutes, which were recited to the jury in the reading of the indictment, in the government's opening statement, as evidence, in the government's closing argument, and, finally, in the court's instructions, the Court of Appeals did not affirm on the ground that petitioner had committed specific violations of state law. Instead, stating that "the [mail fraud] [l]aw puts its imprimatur on . . . accepted moral standards and condemns conduct which fails to match the 'reflections of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society,' " Appendix p. 16, *infra*, the court held that there were three aspects of the scheme upon which the mail fraud convictions under various counts could be predicated:

1. The exertion of undue influence on Charles Swibel, Executive Director of the Chicago Housing Authority ("C.H.A."), an independent governmental agency, "with respect to the sale and attempted sale of certain properties to [Chicago Dwellings Association ("C.D.A."), a not-for-profit corporation]".[4] Appendix, pp. 29-30, *infra*.

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[3] Three counts were withdrawn during trial. Conviction on three others was reversed.

[4] The Court found that "the evidence was insufficient to justify the conclusion that undue influence was used" in connection with sales to another independent agency. Appendix p. 30, *infra*.

2. The use of advance information "with respect to the acquisition [at the scavenger sale] of a significant number of parcels in the 87th and Mackinaw area". (Appendix, p. 18, *infra*.

3. Participation, without disclosure of interest, in City Council proceedings in connection with the clearance of special assessment liens on certain of the properties.

The mailings involved did not pertain directly to exertion of undue influence, use of advance information or participation in City Council procedures, but rather to financing of the original venture, maintenance of land trusts and disposition of properties. Four of the mailings (Counts 8, 14, 15 and 20) concerned a single legitimate arm's-length sale of five lots to United States Steel. The Count 2 mailing was an offer by the City, under threat of condemnation, to purchase a lot. The lots to which these five letters pertained were among those found to be acquired by Alpine "pursuant to advance information about the 87th and Mackinaw development project." Appendix, p. 32, *infra*.

Three mailings (Counts 6, 19 and 4) concerned the disposition of property to private parties, or to an independent governmental body. Some of these properties had been the subject of City Council action. Appendix, p. 32, *infra*.

Count 12 was based on a mailing pertaining to the acquisition of property by C.D.A. which allegedly "was attributable to" petitioner's "use of undue influence on Swibel." Appendix, p. 32, *infra*.

Count 3 was based on a mailing related to the repayment of a bank loan used to finance the acquisitions by Alpine.

Four mailings (Counts 7, 10, 16 and 17) were correspondence with land trustees.[5] Appendix, pp. 34, 35, *infra*.

Although the Court of Appeals classified the alleged scheme into various components and attributed conviction on specified counts to particular aspects of the scheme, no such classification was made for the jury. The jury was not requested to discriminate among counts nor to judge the scheme in this manner. The jury was presented with all the mailings and all the evidence in a confused and undifferentiated mass.

In these circumstances, in which the various aspects of the alleged scheme were so interrelated by the prosecution, if any one aspect falls, the others, too, must fall.

We relate here only those portions of the record concerning the "aspects of the scheme" underpinning the conviction and necessary to an understanding of the questions presented.

Alleged Use of Undue Influence

All of the evidence concerning the charge of undue influence may be summarized as follows:

According to Hennessey, petitioner telephoned Swibel and said, "Charlie, this is Tom Keane. John Hennessey and I own some lots. We would like to have you buy some of them." (T. 494, Appendix, p. 10, *infra*.)

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[5]As regards Counts 16 and 17, the Court of Appeals stated that these were letters from a bank's trust department *in response* to Hennessey's request for an accounting, thus making the facts appear similar to those in *United States* v. *Joyce*, 499 F.2d 9, 18 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974), wherein defendant requested an accounting from the bank to enable him to keep his records straight. The letters here were from the bank to Hennessey, without initiation by Hennessey, requesting that Hennessey check his records so that the bank could verify its own records. (T. 1088)

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Hennessey, at petitioner's direction, then went to Swibel's office. (T. 495). (Petitioner affirmatively denied both the alleged conversation and the direction to Hennessey).

Hennessey testified that he had a two minute conversation with Swibel, during which Hennessey stood while Swibel sat. Hennessey identified himself and stated that petitioner had sent him to sell lots. Swibel was "very curt." Hennessey didn't remember what was said but "walked out . . . with a bad taste in [his] mouth, that [he] wasn't welcome." (T. 496, 766-7).

Independently of the above alleged events, Broderick, a C.D.A. attorney, contacted all county-scavenger-sale purchasers he could find who might have property for sale for use in C.D.A.'s programs. Hennessey was one of those contacted by Broderick. Subsequently, Hennessey gave Broderick a list of available property. Broderick thereafter wrote a letter to Robert A. Snow, director of land acquisition of the C.H.A. (T. 1460). In pertinent part, the letter read:

> "Dear Bob:
>
> Pursuant to Mr. Bach's instructions, I am hereby requesting you to acquire [petitioner's] parcels: [parcels and price omitted].
>
> *Mr. Bach* [executive director of C.D.A.] *informed me that Mr. Swibel told him to purchase these lots as swiftly as possible* and we would use them for the second phase of the Pre-Fab Program." (Emphasis added).

Upon Broderick's mere identification, the above document was admitted as a business record without limitation. No one was produced by the government to testify to either of the alleged conversations related therein. Bach

and Swibel, both of whom were apparently available and had testified before the Grand Jury, but whose testimony was not furnished at any time to petitioner, were not called. No other evidence was introduced on the charge of undue influence.

In closing argument, the government argued that the Broderick letter proved that petitioner actually influenced Swibel, who thereafter successfully coerced Bach, who, in turn, instructed Broderick to request Snow to purchase Alpine lots.[6] Government counsel, after referring to the alleged Hennessey-Swibel conversation and petitioner's "clout", displayed a blow-up of the letter and argued, *inter alia* (T. 3270-3273):

> "It is the summer of 1968. Gerald Broderick was working for the Chicago Dwellings Association, writes a letter to Robert Snow, the Director of Land Acquisitions of the Chicago Housing Authority, and he says:
>
> "'Bock' [sic]—who is his boss at the Chicago Dwellings Association, '. . . informed me that Swibel told him to purchase these lots as quickly as possible as we can use them for the second phase of the prefab program.'
>
> "Ladies and gentlemen, reasonable inference tying this up with the meeting of Charlie Swibel, Charlie Swibel at the bidding of Tom Keane is putting the arm on the Chicago Dwellings Association here to purchase some lots from John A. Hennessey.
>
> • • •
>
> "So what happens, ladies and gentlemen? The Chicago Dwellings Association, as a result of the undue influences exerted by Alderman Thomas Keane on Charlie Swibel, purchases these lots • • •"

---

[6] There is no evidence that Swibel was Bach's superior or that there was a chain of command from Swibel to Bach to Broderick.

The government further argued to the jury that it was relying on the letter instead of calling Swibel to testify because Swibel was unreliable. The government stated:

> ". . . do you think that we were going to call Mr. Swibel? We have people and we have documents which are a lot more reliable than calling in somebody who is in Mr. Swibel's position. Let them call him." (T. 3373).

The charge of "undue influence" permeated the entire case and was used to buttress all of the government's evidence. In closing argument, the government made, *inter alia,* the following references to petitioner's alleged influence:

> ". . . he is one of the most powerful people in the City Council . . ." (T. 3270); he has "clout" (T. 3270); ". . . when you are dealing with a man as powerful as Tom Keane . . ." (T. 3277); ". . . when you need a little pressure, you bring Tom Keane in." (T. 3279); ". . . but Mr. Keane is somebody special. Mr. Keane is somebody powerful . . ." (T. 3356); Mr. Keane is a "very powerful man—" (T. 3373); Mr. Keane "pulls the strings" in the City Council. (T. 3374.)

Alleged Use of Advance Information

The Court of Appeals held that the charge of mail fraud could be predicated upon petitioner's alleged use of advance information which came to him in his official position. The allegation centered about Alpine's purchase of lots in the 87th and Mackinaw area which was later designated for urban renewal. There was, however, no evidence that *any* information about this area came to petitioner by virtue of his official position.

The only evidence introduced to prove use of advance official information was a conversation between petitioner and Hennessey in April or May, 1966:

> "According to Hennessey's testimony Keane said that they should buy all the lots they could in the 87th and Mackinaw area because the government was going to construct a big project there." Appendix, p. 5, *infra*.

Six months before this conversation, a staff memorandum of the City's Department of Urban Renewal ("D.U.R.") recommending a project in the 87th-Mackinaw development area was released to the press. (T. 1532-33). The Chicago Tribune then published an article stating, *inter alia:*

> "A 35-block area on the southeast side known as Millgate [predecessor designation for the 87th-Mackinaw area], sometimes called one of the city's most rapidly deteriorating areas, will be studied for redevelopment by the Department of Urban Renewal." (T. 1602-1605).

This press release and article capped ten years of highly publicized public discussion concerning necessary urban renewal of the area. (A. 70-5; T. 1532-33, 1583; Govt. Ex. 16-11).

The government's proof of the use of advance official information, therefore, consisted solely of petitioner's statement of a fact which had been public knowledge for six months. There was no proof that petitioner received any advance official information or even that there was any information available other than that which had been made public.

The weakness of the government's proof of the alleged use of advance information was highlighted by the government's argument that since Keane had "clout", he "*somehow* was aware that D.U.R. was interested in the . . . area . . ." (e.g. Govt. Br., 38) (Emphasis added).

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The Court of Appeals recognized the weakness in the proof, when it stated:

> "Although the evidence is not overwhelming on the use of advance information charge, and it is possible to interpret the evidence as representing shrewd business judgment on Keane's part, we cannot say that the jury was not entitled to believe that Keane made use of advance information to acquire substantial amounts of property [approximately 30 individual lots] in an area prior to the public announcement indicating that the area was being considered for urban renewal." Appendix, p. 18, *infra.*

No property in this area, however, was acquired "prior to the public announcement."

Alleged Deprivation of Faithful Service

Whether petitioner actually defrauded his colleagues and the public of their "right to . . . faithful service and the right to be advised of material circumstances with regard to the special assessment foreclosures and compromises upon which they voted," Appendix, p. 29, *infra,* requires an understanding of the interrelationships of state statutes, city ordinances and City Council procedural rules and practices. It also requires an understanding of the practice, custom and usage in the Circuit Court of Cook County, the corporation counsel's office and the city comptroller's office pertaining to scavenger property, the levying, collection and distribution of special assessments, the use of special assessment funds and foreclosure proceedings.

Although the Court of Appeals cites certain of the statutes involved, it does not cite all of the statutes necessary to a proper understanding and determination of this issue. Many of the statutes involved have never been interpreted

by local courts, and none of them have been considered in any proceeding resembling the context of the instant case. Certain matters are, however, beyond dispute:

(1) "There does not appear to be a reasonable basis from the exhibits introduced upon which to conclude that properties in which [petitioner] had an interest received any more favorable treatment than other properties that were handled through the 'compromise offer in lieu of foreclosure' procedure." Appendix, p. 8, *infra*, n. 8. This is the only lien clearance procedure in which the City acted without final decision by the Circuit Court of Cook County.

(2) The delinquent special assessment bonds involved were issued at least 40 years ago; there is no evidence that persons other than professional dealers in special assessment bonds held the bonds.

(3) As regards foreclosures, the Circuit Court of Cook County, not the City Council, actually set the minimum bid on a transcribed record made in open court after notice to all interested parties who were entitled to appear and participate in both the judicial procedure setting the minimum bid and the ultimate foreclosure sale. (T. 1088, 1111-1112, 1115-1116.)

(4) The bondholders invariably settled their claims among themselves. (T. 1104-1106, 1195, 2439, 2662, 2663, 2761, 2784).

(5) Everyone involved in special assessment procedures testified that the minimum bid made no difference to the foreclosure price or the return realized by the bondholders. (T. 1104-6, 1195, 2662-3, 2761, 2784, 2765-6, 2444, 2450, 2493).

(6) Although the court below held "it is not clear how these [special assessment] funds are or will be used in the

future, we cannot say that the city has no interest in using them again as it did in the depression or in some other manner," it *is* clear how special assessment funds were used in the past and will be used in the future. By law, these funds may be used *only* to pay bondholders. People v. *Drobnick*, 1 Ill.2d 456, 461 (1963); *City of Park Ridge* v. *Hollis*, 35 Ill.2d 489, 493 (1966).

Although the court held, in effect, that for purposes of the mail fraud statute petitioner's interest, in and of itself, was a material fact and that "Keane should have disclosed his interest" (Appendix, p. 29, *infra*), the aldermen who testified were divided on this issue. Those who demonstrated an understanding of special assessment procedures and foreclosures testified that in these circumstances in which the City had no financial interest and in which the City Council's action was ministerial or *pro forma*, disclosure was not necessary. (T. 2495-2496, 2575, 2579, 2588); those who demonstrated a lack of understanding of foreclosure proceedings or special assessments testified that there should have been disclosure. (T. 1840, 1338-1339, 1348, 1353, 1751, 1757, 1810, 1846, 1824, 1861-1862).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CREATES CONFUSION CONCERNING AND DISREGARDS CONSTITUTIONAL REQUIREMENTS INVOLVED IN, THE INTERRELATIONSHIP OF THE CONFRONTATION CLAUSE AND THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE.

Confrontation and cross-examination of witnesses are basic to the administration of criminal justice in the adversary system. Thus, the evidentiary hearsay rule has not been equated with the confrontation clause. *Dutton* v. *Evans,* 400 U.S. 74, 86 (1970). Nor is that clause "a codification of the rules of hearsay and their exceptions as they existed historically at common law." *California* v. *Green,* 399 U.S. 149, 155, 156 (1970).

Here, the Seventh Circuit, relying solely on the "business record" exception to the hearsay rule, permitted a sequence of conversations to be introduced against petitioner by memorandum in total disregard and without consideration of his basic rights to confront and cross-examine the alleged declarants. Appendix, pp. 43-45, *infra.*

Hearsay evidence, justified as an exception to the rule, has, on limited occasion, been received without raising constitutional objections. See *Mattox* v. *United States,* 156 U.S. 237, 244 (1895). However, there has been in those cases an overwhelming argument made for its reliability (either as a result of pre-trial confrontation or otherwise), *Man-*

cusi v. *Stubbs*, 408 U.S. 204 (1972), and a clear showing of the declarant's unavailability. The need for jury evaluation of the declarant's demeanor has been minimal.

There is, no doubt, a trend toward greater use of hearsay evidence and, hence, an erosion of the hearsay rule. Concurrently, however, it is increasingly recognized that the constitutional standards required by the confrontation clause and due process place limitations on receipt of hearsay evidence against an accused.

Under the guidelines required by the confrontation clause, there must be a showing of both great necessity and reliability to enable evidence to be admitted pursuant to a business record exception. ". . . [T]he fact that evidence fits the statutory definition of 'business records' should not of itself determine that it is constitutionally admissible." Jennings, Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials, 113 U. of Pa. L. Rev. 741, 763-764 (1965).

The Seventh Circuit, here, has ignored guidelines heretofore recognized. Instead of requiring a showing of nonavailability of witnesses and reliability of testimony, it has put its imprimatur on the use of business record hearsay of alleged declarants without a showing of reliability and nonavailability. The Seventh Circuit, thus, places hearsay and the confrontation clause in absolute congruency.

Moreover, through an expanding hearsay exception, the Seventh Circuit has sanctioned as competent evidence, hearsay testimonial utterances far beyond those heretofore found to be compatible with the constitutional guarantee and has contracted the area in which the right to confrontation may effectively operate.

The problems attendant upon the interrelationship of the confrontation clause and the hearsay rule have been

underscored by the adoption of the Federal Rules of Evidence. The Advisory Committee clearly recognized the issues. See *Advisory Committee's Introductory Note on the Hearsay Problem* reprinted in 4 Weinstein's Evidence, 800-1—800-8 and particularly 800-5, 800-7. Judge Weinstein, in his treatise, further focuses on this issue:

> "What then does the Confrontation Clause mean? Does it impose any limits on the receipt of hearsay evidence against an accused, or are the interests served by the constitutional doctrine so similar to the rationale underlying the hearsay rule that an exception which meets evidentiary tests also satisfies the constitutional standard? The Supreme Court has on numerous occasions expressly rejected the notion that the hearsay rule and the right of confrontation are congruent, though it acknowledges that both protect similar values. (footnote omitted) But it is still far from clear precisely what limits the constitutional doctrine imposes. Part of this uncertainty derives from the fact that the confrontation clause has received relatively little judicial attention until recently.
>
> • • •
>
> ". . . [A] large gray area still exists where it is not clear to what degree the two doctrines overlap." (4 Weinstein's Evidence, 800-19, 800-20).

Even prior to the new rules, the Courts of Appeals have expressed concern as to the interrelationship of the expanding "business records" exception to the hearsay rule and confrontation and due process standards. The Courts of Appeal for four Circuits (Second, Fourth, Fifth and Ninth) have at times expressed doubt that the confrontation clause places any limit upon the business records exception. See, e.g., *United States* v. *Leathers*, 135 F.2d 507, 511 (2d Cir. 1943) (mailing stamps affixed by bank to nu-

merous letters in the ordinary course of business); *Kay* v. *United States*, 255 F. 2d 476, 480, 481 (4th Cir. 1958) (certificate showing alcoholic content of a blood sample); *Hanley* v. *United States*, 416 F.2d 1160, 1167-1168 (5th Cir. 1969) (bank collection slips); *McDaniel* v. *United States*, 343 F. 2d 785, 789 (5th Cir. 1965) (accounting records); *Warren* v. *United States*, 447 F. 2d 259, 262 (9th Cir. 1971) (proof of non-registration of a weapon).

Courts in other circuits hold on the other hand, that the confrontation clause places an absolute limitation on the introduction of evidence under the business records exception. *Phillips* v. *Neil*, 452 F. 2d 337, 347 (6th Cir. 1971) (hospital records read in rebuttal to an insanity defense); *United States* v. *Johns-Manville Corp.*, 225 F.Supp. 61, 63 (E.D. Pa. 1963) (business records generally).

The confusion within the Circuits is apparent in the holding of *McDaniel* v. *United States*, 343 F.2d 785. There, the Fifth Circuit conceded that the trial judge has a duty to determine whether business records are constitutionally admissible under the confrontation clause, but the court weakened this position by stating that the confrontation clause may not be invoked to exclude evidence admissible pursuant to an exception to the hearsay rule. 343 F. 2d 785, 789.

Other courts have recognized in matters involving the "business records" exception that "[t]he Act was not designed * * * to facilitate the introduction of hearsay as to which the reporter, if he appeared in person, would not be allowed to testify." *United States* v. *Burruss*, 418 F.2d 677, 678 (4th Cir. 1969); *United States* v. *Parker*, 491 F.2d 517, 521 (8th Cir. 1973); *United States* v. *Beasley*, 513 F.2d 309, 314 (5th Cir. 1975).

In those instances in which the use of business records has been permitted, the writings contained information

similar to that found in the original "shop books." The information was reliable because of its routineness; its admission was necessary because of the impracticality of determining who, or even how many persons, were responsible for the entry.

In the instant case, the Seventh Circuit, without apparent consideration of the constitutional implications, has gone far beyond routine shop book material and sanctioned the use of a "business record" reciting two conversations involving three persons and has permitted the government the widest latitude in drawing inferences therefrom.[7] The business record was merely identified as such; no one was called to testify concerning the conversations reported therein. The use of this type of memorandum as a substitute for direct testimony to introduce an alleged sequence of conversations negates any constitutional protection.

The use of a document in this manner does more than prevent confrontation of witnesses by the accused. The quest for a verdict inspires "trial by memorandum." Adversary examination is replaced by untested documentary evidence evaluated only by the prosecutor. The opportunity for abuse of prosecutorial discretion is maximized. See *Phillips* v. *Neil*, 452 F.2d 337, 347 (6th Cir. 1971).

The document here admitted was critical to the government's case. It was used for a variety of purposes and as the basis for multiple inferences concerning the alleged use of undue influence. Thus, it, alone, of thousands of documents, was specially enlarged for presentation and argument to the jury.

The government made absolutely no showing of necessity to justify the introduction of the memorandum as a

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[7] The constitutional implications of the issue were raised below. (See Keane's Brief, 91-95 and Petition for Rehearing, 13-16.)

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substitute for the direct testimony of Bach and Swibel. The government made no effort to show that Bach or Swibel, both of whom had testified before the Grand Jury, were unavailable. Instead, in rebuttal argument, the government explained its failure to call these declarants by attacking their reliability, thus enhancing the need for the jury to determine their credibility and the validity of the government's assertion that the declarants were, in fact, susceptible to petitioner's pressure. The jury could not make these determinations merely on the basis of the hearsay letter. (T. 3373, 3374)

As the evidence sought to be adduced by the government through the use of the document and the inferences to be drawn therefrom were crucial in proving the alleged "scheme", a burden was placed upon the government to produce the declarants or, at least, to account for their unavailability. As Judge Weinstein states:

> "If the evidence is crucial and has never been tested by cross-examination, the burden on the government of producing the declarant or accounting for his unavailability does not seem unduly large, particularly since a person's liberty is at stake. This is a situation par excellence where the right to confrontation should prevail."[8] (4 Weinstein's Evidence, 800-24).

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[8] It has been stated that "The trial judge in a criminal case should admit hearsay statements only if the defendant is afforded an adequate substitute for confrontation." Jennings, Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials, 113 U. of Pa. L. Rev. 741, 748 (1965). In this case, there has been no substitute. Petitioner has been denied access to the Grand Jury testimony and other statements, if any, of Bach and Swibel. We respectfully request the Court to examine this testimony *in camera* to determine whether the government's use of the "Broderick letter" comports with "the fundamental demands of due process of law in the fair administration of criminal justice." *United States* v. *Nixon*, 418 U.S. 683, 713 (1974).

Moreover, the use of the multiple hearsay document, in conjunction with the closing argument made therefrom, demonstrates, as the the commentators have heretofore indicated, that the confrontation clause should be employed to establish proper standards for prosecutorial behavior. McCormick, Evidence, §252 at p. 607 (2d Ed. 1972); Note, Confrontation and the Hearsay Rule, 75 Yale L. Jour. 1434 (1966):

> "The Confrontation Clause . . . should focus on the legitimate concern raised by a liberalized hearsay rule: that such a rule may institutionalize baseless prosecutions, or at least tempt prosecutors to use hearsay instead of live witnesses whose demeanor is unimpressive; or that it may induce prosecutorial negligence in securing witnesses by holding out the easy alternative of presenting their statements through other witnesses. Such practices undermine any system of criminal justice that presumes innocence and insists that the process of rebutting the presumption be absolutely above reproach.
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> * * *
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> "The objection to the prosecutor's presentation of hearsay instead of an available witness is not that such hearsay necessarily is less reliable than the hearsay of an unavailable witness, but that the prosecutor has made the testimony less reliable than it might have been." (75 Yale L. Jour., 1434, 1438, 1439).

Here, the prosecutor used the document and, in closing argument, made extensive references thereto and drew broad inferences therefrom. Because the testimonial utterances in the document are untested, it cannot be determined whether the government's closing argument accords with the standards required by *Berger* v. *United States*,

295 U.S. 78, 88 (1934). Only the government has knowledge of the facts, and it has failed to reveal them.[9]

The issues raised by the admission and use of the document in this case concern the administration of criminal justice in the federal courts and the nature of criminal trials. They assume added dimensions in the light of the adoption of the Federal Rules of Evidence.

Respectfully, these issues justify the grant of certiorari to review the judgment below.

II.

THE DECISION BELOW CONFLICTS WITH THE STANDARD OF REVIEW REQUIRED IN CRIMINAL CASES.

The inferences drawn from the multiple hearsay chain in the Broderick letter permeated and affected the entire trial. If it could be found that petitioner was so powerful as to unduly influence a man of Swibel's stature, the concededly weak evidence of "advance information" gains appeal. Here, the entire charge is based upon petitioner's position as an important local government figure and the fact that he allegedly suggested purchase in the 87th-Mackinaw development area even though (1) the evidence was undisputed and overwhelming that information concerning urban renewal there had previously been published in mass media, and (2) there was no evidence that petitioner had, in fact, obtained advance, confidential or inside information.

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[9] Because of the withholding of the Bach and Swibel testimony, it cannot be determined whether the government has failed to produce favorable evidence in violation of the mandate of *Brady* v. *Maryland*, 373 U.S. 83 (1963).

"Advance information," per se, is not unlawful or even improper. To use advance information improperly, the information must be "inside" or confidential.

The opinion below, however, creates an irrebuttable presumption that, if a public official has any information, it necessarily is either "inside" or "confidential." This is not the law. The creation of such a presumption insofar as it affects the quantum of evidence required for conviction merits review.

Without such a presumption, the evidence concerning advance information, taken most favorably to the government, is not merely "not overwhelming," Appendix, p. 18, *infra;* it is so insubstantial as to violate the standard required on review of criminal cases. Viewed in the light most favorable to the government, there must be substantial evidence of guilt to sustain a conviction. See *Glasser* v. *United States,* 315 U.S. 60, 80 (1942). However, this facet of the alleged scheme, the use of advance information, is "so totally devoid of evidentiary support as to render . . . [conviction] unconstitutional under the Due Process Clause . . ." See *Garner* v. *Louisiana,* 368 U.S. 157, 163 (1961); *Thompson* v. *City of Louisville,* 362 U.S. 199, 204 (1960).

III.

THE PROSECUTION HERE INTRUDES ON AREAS OF PECULIARLY LOCAL CONCERN. APPROVAL WILL PERMIT GREATLY EXPANDED FEDERAL OVERSIGHT AND CONTROL OF LOCAL AFFAIRS.

This case concerns complex state regulatory schemes in areas traditionally the province of local administrators and state courts and not heretofore the subject of claims of

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"fraud". Statutes and ordinances governing scavenger sales, special assessment procedures and local foreclosure practices have, for the first time and for the purpose of effecting this prosecution, been interrelated with other state statutes pertaining to conflict of interest and a city council rule of order. Interpretation of such laws and their interrelationships is properly a function of the state and is customarily left to its judiciary. The federal criminal claim against petitioner is clearly "entangled in a skein of state law. . . ." *McNeese* v. *Board of Education,* 373 U.S. 668, 674 (1963).

In addition, federal intervention of this sort inevitably and improperly creates standards for local legislators. Such standards, even on the federal level, are, at best, vaguely defined. "Once outside the boundaries of bribery and overt self-dealing, there is very little consensus . . . about what constitutes a legitimate or an illegitimate business or political transaction." See Beard and Horn, Congressional Ethics, The View from the House, 42-45 (Brookings, 1975).

Ordinarily, in civil cases, where complex state statutory schemes are involved, federal courts will abstain from making rulings. Such state law questions are left to be decided by state courts. *City of Chicago* v. *Fieldcrest Dairies, Inc.,* 316 U.S. 168 (1942); *Harris County Commissioners Court v. Moore,* 420 U.S. 77 (1975). This principle is equally important in the administration of criminal justice. As stated in *Hoag* v. *New Jersey,* 356 U.S. 464, 468 (1958):

> ". . . It has long been recognized as the very essence of our federalism that the states should have the widest latitude in the administration of their own system of criminal justice."

In this case no traditional crime or fraud supported the alleged "mail fraud." There was neither bribery, extor-

tion, income tax evasion, false pretenses or the use of false statements. The fraud, at best, depended on petitioner's alleged technical breach of vague, moral standards established by the courts below. Even then the courts varied. The district judge premised his standards on the state statutes and City Council Rules, and instructed the jury accordingly.[10] (T. 3416-22) The Court of Appeals paid lip service to the state statutes, but grounded its conclusion that there was fraud on an amorphous standard of moral conduct. Appendix, pp. 15-16, *infra*. Absent the mail fraud statute, however, a federal court would not consider the peculiarly local *in rem* procedures with which the various state and local governmental and judicial agencies were here involved. This prosecution, thus, encourages intrusion into delicate areas of a state's administration of purely local procedures and shifts massively the authority of the federal government to control local affairs.

It was not the purpose of the mail fraud act to provide a vehicle for this sort of federal oversight or intervention by federal prosecutors or courts, particularly in areas in which their knowledge and awareness is limited and where local custom and practice might place a gloss on literal interpretation of statutory language.

Intrusion into the local arena (and, especially, into local politics) has been a recurring issue in the administration of federal criminal justice. Such intrusion has been strongly condemned.

The late Justice Robert A. Jackson, as Attorney General of the United States, addressed a conference of federal prosecutors on the proper use of their power:

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[10] The trial court's instructions recited the statutes with no attempt at explanation.

"[A] . . . delicate task is to distinguish between the federal and the local law enforcement activities . . . we are concerned only with the prosecution of acts which the Congress has made federal offenses. . . .

"But outside of federal law each locality has the right under our system of government to fix its own standards of law enforcement and/or morals. And the moral climate of the United States is as varied as its physical climate. . . . In spite of the temptation to divert our power to local conditions where they have become offensive to our sense of decency, the only long-term policy that will save federal justice from being discredited by entanglements with local politics is that it confine itself to strict and impartial enforcement of federal law . . . there should be no striving to enlarge our power over local affairs and no use of federal prosecutions to exert an indirect influence that would be unlawful if exerted directly." (Journal of the American Judicature Society, Vol. 24, No. 1, June, 1940, p. 20.)

See *United States* v. *Archer,* 486 F. 2d 670, 677-678 (2d Cir. 1973). See also Jackson, *The Supreme Court in the American System of Government,* 70, 71 (Harper Torchbooks, 1963); *Screws* v. *United States,* 325 U.S. 91, 160-161 (1944) (Frankfurter, J., dissenting); *Rutkin* v. *United States,* 343 U.S. 130, 141-146 esp. n. 5 at p. 144 (1951) (Black, J., dissenting); Friendly, Federal Jurisdiction: A General View, 58, 61 (1973).

The instant prosecution uses the mail fraud statute to alter significantly the federal-state balance. All of the acts of petitioner were intrastate. If a crime has been committed, state criminal statutes are available. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the states. The mail fraud statute was enacted in accord with that principle. The legislative history of the Act does not demonstrate

any other purpose. See, e.g., *United States* v. *Bass*, 404 U.S. 336, 349-350 (1971). See also, *Rewis* v. *United States*, 401 U.S. 808, 812 (1971). Thus, this case "dramatically intrudes" upon traditional state criminal jurisdiction.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JEROME H. TORSHEN
11 South LaSalle Street
Chicago, Illinois 60603
312-372-9282

JOHN POWERS CROWLEY
53 West Jackson Blvd.
Chicago, Illinois 60604
Attorneys for Petitioner.

SHERMAN C. MAGIDSON
MARIA A. SKIRNICK
EDWARD G. WIERZBICKI
On the Brief